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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-862

JAMES HARRISON CAMPBELL, III,
Appellant,

versus

THE STATE OF GEORGIA,
Appellee.

Appeal from the Court of Appeals of the State of Georgia

JURISDICTIONAL STATEMENT ON APPEAL, *or alternatively,* PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §2103

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

JAMES HARRISON CAMPBELL, III,
Appellant,

versus

THE STATE OF GEORGIA,
Appellee.

On Appeal from the Court of Appeals of the State of Georgia

JURISDICTIONAL STATEMENT ON APPEAL, *or alternatively*, PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §2103

Appellant, James Harrison Campbell, III, appeals from a judgment of the Court of Appeals of the State of Georgia, which affirmed appellant's conviction for possession of cocaine with intent to distribute same, an offense proscribed by the Georgia Controlled Substances Act, Ga. Code Ann. §79A-811(b) (Acts 1974, pp. 221, 243). As more fully appears hereinbelow, Appellant challenged the constitutionality of the search warrant and the statute under which the Georgia courts alternatively held the search and seizure sustainable in the Courts of the State of Georgia. Appellant submits this statement to show

that the judgment of the Georgia Court of Appeals is incorrect, that the Supreme Court of the United States has jurisdiction of this appeal, and that such appeal presents substantial questions of constitutional law under the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

OPINION BELOW

The Order of the Supreme Court of the State of Georgia, denying Appellant's petition for a writ of certiorari to the Georgia Court of Appeals, is an unreported order. A post card reflecting the action of the Georgia Supreme Court is attached as a part of the Appendix filed with this Jurisdictional Statement.

The Opinion of the Georgia Court of Appeals, from which this appeal is taken, is reported at ___ Ga.App. ___, 228 S.E.2d 309, and the unreported order denying a petition for rehearing is likewise annexed as a part of the Appendix.

The opinion is dated July 1, 1976, *reh. den.*, July 20, 1976, and was entered in the Georgia Court of Appeals on or about that date.

The Supreme Court of Georgia denied Appellant's petition for a writ of certiorari on September 23, 1976, as evidenced by the aforementioned post card from the Clerk of the Supreme Court of Georgia. The Notice of Appeal to this Court was filed by Registered Mail, Return Receipt Requested, in the Georgia Court of Appeals, the highest court of the State of Georgia to which Appellant could appeal as a matter of right,

hence which he could obtain a judgment, a copy of which is annexed hereto as a part of the Appendix to this Jurisdictional Statement.

JURISDICTION

Appellant moved the Trial Court to suppress the evidence on the ground that the search warrant, under the authority of which the police officers pretended to act, was a general warrant in that it authorized the search of certain designated premises and specified person "and any other person on said premises who reasonably might be involved in the commission of the aforesaid violation of the laws of Georgia." Other attacks made against the validity of the search warrant were that the said warrant delegated to the executing police officers the power and authority to search persons who "might" be involved, a standard less than probable cause, and that, since the search of all the persons found on the premises occurred prior to the discovery of any violation of the Controlled Substances Act, the search of the "other persons" was an unreasonable search and seizure. Appellant also urged in the Trial Court that Ga.Code Ann. §27-309 was unconstitutional on its face and as applied against Appellant because it allows searches without probable cause on the basis of a person's mere presence upon premises designated in a warrant to be searched.

The State of Georgia relied upon the holding of the Supreme Court of Georgia, in *Wood v. State*, 224 Ga. 121, 160 S.E.2d 368 (1968), and *Willis v. State*, 122 Ga.App. 455, 177 S.E.2d 487 (1970), and Ga.Code Ann.

§27-309, for its position that the search warrant and the search under its authority were legal.

The Trial Court overruled Appellant's motion to suppress the evidence and, after Trial by jury, Appellant appealed the judgment of conviction to the Georgia Court of Appeals, urging that the search warrant authorized a general search and seizure directed against persons for whom no probable cause had been presented to a Magistrate, and that Ga.Code Ann. §27-309(a), authorizing a search of "other persons" for weapons was not responsive to the mandate of *Terry v. Ohio*, 392 U.S. 1 (1968), or *Sibron v. New York*, 392 U.S. 40 (1968), and that Ga.Code Ann. § 27-309(b), authorizing the search of "other persons" found on the designated premises for evidence which might be concealed on their persons violated the proscription against unreasonable searches and seizures contained in the Fourth and Fourteenth Amendments to the United States Constitution, as established by this Court in *United States v. Di Re*, 332 U.S. 581, 587 (1948). The Georgia Court of Appeals held (___ Ga.App. ___, 228 S.E.2d at 312):

> In summation, we note that the "other persons" clause was superfluous; it neither made the warrant general nor extended authority to search anyone other than the person named, *i.e.*, "Tim." However, because the officers were executing a valid warrant, under Code Ann. §27-309 they were permitted to make a very limited search of those present in the apartment at the time. When, in the course of that search, officers found what they suspected to

> be weapons or cocaine, they were authorized under the statute to seize those items.

Appellant urged on petition for rehearing that the facts in the record would not justify a search under Ga.Code Ann. §27-309(a) or (b), conducted in conformity with the precedents of this Court, and that if the provisions of the warrant were severable and the search separately sustainable under Ga.Code Ann. §27-309(a) or (b), "then Ga.Code Ann. §27-309 is unconstitutional because it authorizes the search of the person of persons on premises, without probable cause, hence it authorizes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America." Pet. for Reh., p. 14. The Court of Appeals of Georgia denied the petition for rehearing, as aforesaid, and the Georgia Supreme Court declined to exercise its discretionary power to review this case.

The Georgia Court of Appeals is the highest court of the State of Georgia from which this appeal may be taken, when the Georgia Supreme Court declines to review the case on writ of certiorari. This appeal is therefore properly made from the judgment of the Court of Appeals of Georgia. 28 U.S.C. §1257; *Williams v. Florida*, 399 U.S. 78 (1970); *Tucker v. Texas*, 326 U.S. 517 (1946); *Woods v. Neirstheimer*, 328 U.S. 211 (1946); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

This is a proper case to be brought on appeal from the state courts, pursuant to 28 U.S.C. §1257(2), since the issue of the constitutionality of Ga.Code Ann. §27-

309 was directly contested in the Georgia Courts and the opinion of the Georgia Court of Appeals, holding that the "other persons" clause of the contested search warrant was "superfluous" and that the search was sustainable under Ga.Code Ann. §27-309 clearly reflects that the said Court rejected Appellant's argument against the constitutionality of the statute, that being that §27-309 contravened the Fourth and Fourteenth Amendments to the United States Constitution, and upheld the validity of the said statute. This case is thus properly before this Court on Appeal. *Street v. New York*, 394 U.S. 576 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). *See*, also, *Vale v. Louisiana*, 399 U.S. 30, 31 (footnote) (1970), in which this Court distinguished between cases reviewable on appeal and those reviewable on writ of certiorari.

Should this Court decide that jurisdiction does not lie under 28 U.S C. §1257(2), then Appellant petitions this Honorable Court to treat these papers as a petition for a writ of certiorari pursuant to 28 U.S.C. §2103. *See Vale v. Louisiana*, 399 U.S. 30, 31 (footnote) (1970).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, making the Fourth Amendment applicable to and enforceable against the States through its Due Process Clause [Mapp v. Ohio, 367 U.S. 643 (1961)], provides, in relevant part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

Georgia Code Ann. §27-309, provides:

> In the execution of the warrant the person executing the same may reasonably detain or search any person in the place at the time:
>
> (a) To protect himself from attack, or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

QUESTIONS PRESENTED

1. WHETHER GA. CODE ANN. §27-309 MAY BE FOUND TO BE CONSTITUTIONAL WHEN IT, AS CONSTRUED IN THIS CASE, AUTHORIZES ROUTINE SEARCHES FOR WEAPONS WITHOUT THE JUSTIFICATION REQUIRED AS A PREDICATE TO

A "PAT-DOWN" ENUNCIATED BY THIS COURT IN *TERRY V. OHIO*, 392 U.S. 1 (1968), AND *SIBRON V. NEW YORK*, 392 U.S. 40 (1968), AND FURTHER AUTHORIZES THE POLICE TO ROUTINELY EXTEND A SEARCH AUTHORIZED TO BE CONDUCTED OF SPECIFIED PREMISES TO THE PERSON OF VISITORS ON THOSE PREMISES IN THE ABSENCE OF ANY SIGNS OF PROBABLE CAUSE TO ARREST OR SEARCH SUCH VISITORS AT THE TIME THEY ARE SEARCHED.

2. WHETHER, IN THIS CASE, THE SEARCH WARRANT CONTAINING A PHRASE AUTHORIZING POLICE TO SEARCH "OTHER PERSONS" WHO "MIGHT" BE INVOLVED, CONSTITUTED A GENERAL WARRANT AND VITIATED THE SEARCH *AB INITIO*.

3. WHETHER THE SEARCH AND SEIZURE OF APPELLANT WAS UNREASONABLE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS.

STATEMENT OF THE CASE

A. Facts Material to the Questions Presented.

On June 23, 1975, Officer M. J. Waddell of the Atlanta Narcotics Squad obtained a warrant from a Judge of the Municipal Court of Atlanta authorizing the search of 2572 Lenox Road, N.E., Apartment H-12, Atlanta, Fulton County, Georgia, a person described as "Tim (W/M)," "and any other person on said premises who

reasonably might be involved in the commission of the aforesaid violation of the laws of Georgia."

Armed with such a warrant, several narcotics officers went to the designated premises and, after a period of surveillance during which the officers observed Appellant Campbell enter the said premises, the officers approached the described residence for the purpose of executing the search warrant. The apartment had a front and rear door. The officers went to each door. The officers at the rear door made their presence known and Timothy Deuser, the "Tim (W/M)" mentioned in the search warrant, looked out through a window in the door by raising a curtain. The police testified they then identified themselves to Timothy Deuser as police officers with a search warrant. Timothy Deuser stepped away from the door and did not immediately open it. Apparently fearing that any evidence on the premises would otherwise be destroyed, the police officers at the rear door broke open the door and apprehended Timothy Deuser some six or eight feet from the door, either in the kitchen or in the dining room of the apartment heading for the living room where some four or five other guests were assembled. These officers immediately placed Timothy Deuser under arrest and rushed into the living room where his guests were located. Whether or not the Atlanta policemen identified themselves to Timothy Deuser at the kitchen door, there was no testimony that the officers heard Deuser warn his guests that the police were there and there is no evidence that Deuser's guests knew it was the police who broke into the rear door of the apartment. At any rate, there was confusion among Deuser's guests,

some of whom were moving about and others who simply stood up when they observed the intruders. Appellant Campbell, when he saw the weapons, ducked beside a television set to reduce the likelihood of being shot by persons breaking in the apartment. The police officers made everyone submit to a search of their persons. During the course of that search, one of the officers felt a bottle in the front pocket of Appellant Campbell's trousers. The officer seized that bottle, which contained a quantity of cocaine. Continuing the search of Appellant Campbell, the officer discovered two pistols in the rear waistband of his trousers, concealed under a shirt. The weapons were not observed by the police, nor was there any conduct on the part of Appellant Campbell to indicate that he was armed. Otherwise, the officers would have first disarmed him before pursuing a search for evidence in his front pockets. The record clearly reflects that the officers seized the drugs from his front pocket before they even commenced a search for weapons. On the hearing of the Motion to Suppress, Detective Waddell testified (Mo.Tr. 25):

Q. * * * Where did you find this plastic bottle?
A. In his right pocket.
Q. In his right pocket?
A. Yes, sir.
Q. Okay. Did you actually reach your hand in his pocket to get it, or did he take it out? Can you remember exactly how it was?
A. Well, he had both hands on the wall so I reached in and got it.
Q. And was that the first pocket you went into, the best you remember?

A. I can't remember, Mr. Zell.
Q. Now, and then thereafter did you find the weapons?
A. Yes, sir.

There can be no doubt about the order of the discovery of the drugs and then the weapons, for Detective Waddell was again questioned specifically about the order of these discoveries and he reaffirmed that the search of Appellant Campbell's pockets for drugs preceded the search for weapons (Mo. Tr. 27):

Q. After you then reached your hand in Mr. Campbell's pocket and pulled out the drug, the alleged drug, you then searched him fully and found the weapons?
A. Yes, sir.

The search of the persons of Timothy Deuser and the "other persons" having been completed, the officers commenced a search of the premises for cocaine.

There was no evidence of crime apparent when the officers entered and commenced their search of the "other persons" on the premises. The testimony of Officer Colquitt, who discovered the cocaine, clearly establishes that the cocaine was concealed:

Q. * * * Now, this is a diagram — you weren't here when it was drawn, but this is the front door here, and this is the back door, and there was a chair by the front door. Was that the chair where the alleged drugs were found?

A. Yes, sir.
Q. Okay. Could you tell exactly where they were found in the chair?
A. Okay. The chair had two cushions. One that fits over the back of the chair that you sit on.
Q. Uh-hum.
A. All I did was push the upright cushion down and they were in a yellow manila envelope behind that upright cushion.
Q. So in seated here the upright cushion would be this cushion here?
A. Yes, sir.
Q. And it was found behind this upright cushion?
A. Yes, sir. (Trial Transcript, pp. 142-143)

* * * *

Q. Everybody was laid out on the living room floor and being watched at that time?
A. Yes, sir.
Q. Okay. And the alleged cocaine was found over in the chair indicated by an R on that diagram, is that correct?
A. Yes, sir.
Q. Okay. By yourself?
A. Yes, sir.
Q. It was not sticking out or sticking out of the chair in any way, it was covered up, is that right?
A. Yes, sir. (Trial Tr. 160-161)

The testimony of Detective Waddell, the officer in charge of this operation, clearly establishes that the

searches of the "other persons" on the premises was a routine action of the Atlanta police, taken without any reasonable basis for believing that the officers were in any apparent danger or without a reasonable basis for believing that Timothy Deuser had passed anything to anyone on the premises at or after the time the officers commenced the execution of the search warrant (Trial Tr. 30-31, 32):

Q. It is your normal course and conduct to search everyone found in the apartment?
A. Yes.
Q. That's standard SOP or police procedure?
A. Yes, sir.
Q. In every case you make, upon entering the apartment, if there are males they will be searched, and if there are females you'll get a matron and search the females?
A. Yes, sir, if one's available.

* * * *

Q. You don't — when you entered the premises in this particular case, you searched everyone? It's just your standard police policy that you do that when you enter your [*sic*] apartment?
A. For our own protection, we do it.

B. The Manner in Which the Federal Questions Were Raised In the State Courts.

The issues presented by this appeal were raised in the Superior Court of Fulton County, Georgia, by a

pleading entitled Demurrer and Second Motion to Suppress, which is filed in Minute Book 385, page 415, a copy of which is annexed as part of the Appendix to this Jurisdictional Statement. The grounds for suppressing the evidence were stated to be:

1.

That the police officers did search James Campbell after entering an apartment pursuant to a search warrant which mentioned only a person called Tim as the person to be searched; that the police officers did search the defendant without any probable cause or underlying facts because he was present in the living room and therefore said search was a general search and was void and unconstitutional, and the drugs found on him [should] be suppressed.

2.

Defendant demurs to Ga. Code Ann. 27-309 (Acts 1966, pp. 567, 570) and shows that said statute is unconstitutional on its face and as applied since it allows the police officer to detain and search any person located on the premises without probable cause or any underlying facts for the sole reason that the person is merely present; that the standard in said statute permits a detention and search with less than probable cause and therefore violates the Fourth and Fourteenth Amendment of the United States Constitution.

An Order denying the Motion to Suppress was made and entered on September 11, 1975, recorded in the Minute Books of the said Court of first instance at Book 383, page 385, a copy of which is annexed as a part of the Appendix hereto.

The issue relative to the general nature of the search warrant and of the subsequent search conducted pursuant thereto were raised in Appellant's Original Brief and in a document styled "Enumeration of Errors." The Georgia Court of Appeals apparently agreed that the search warrant could not legally authorize in advance the search of "other persons" on the premises authorized to be searched, held that the "other persons" clause of the search warrant was "superfluous," and held that the search was justifiable under Ga. Code Ann. §27-309. *Campbell v. State*, ___ Ga.App. ___, 228 S.E.2d 309, 312 (quoted ante, p. 3, under heading, "Jurisdiction"). Following this development, Appellant filed a Petition for Rehearing which, at pages 13 and 14, stated:

> * * * If it is legal to construe that executed authority within a search warrant may be severable and [the validity of the search] grounded on other authority, and if it is construed that Ga.Code Ann. §27-309 authorizes what was done in this case, then Ga.Code Ann. §27-309 is unconstitutional because it authorizes the search of the person of persons on premises, without probable cause, hence, it authorizes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

The Court of Appeals of Georgia, on July 20, 1976, denied the Petition for Rehearing, a copy of which Order is Annexed hereto as part of the Appendix to this Jurisdictional Statement. The Supreme Court of Georgia denied a Petition for Writ of Certiorari and thus declined to review the judgment of the Georgia Court of Appeals. A copy of a notice of the Court's action is annexed hereto to show that the judgment of the Georgia Court of Appeals is a final judgment or decree by the highest court of Georgia in which a decision could be had, thereby permitting an appeal to this Court from the Georgia Court of Appeals, rather than the Supreme Court of Georgia, upon the authority of the cases heretofore cited in the portion of this Jurisdictional Statement entitled "Jurisdiction."

C. Grounds on Which it is Contended that the Federal Questions are Substantial.

The statute of the State of Georgia, Ga.Code Ann. §27-309, authorizes the indiscriminate search of persons on premises designated to be searched by a search warrant, without any necessity for the officers to have probable cause for a search or reasonable grounds for a frisk. The Georgia Supreme Court supposedly has limited the applicability of Ga.Code Ann. §27-309 (a), relative to searches for weapons, to those cases "where the executing officer may reasonably believe that it is necessary" to protect himself from attack. *Wood v. State*, 224 Ga. 121, 124, 160 S.E.2d 368 (1968). The Georgia Court of Appeals, in *Smith v. State*, ___ Ga. App. ___, 228 S.E.2d ___ (1976), decided only weeks prior to the decision in the present case, reaffirmed that the conditions to such a search must be

found compatible with the constitutional limitations imposed by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Sibron v. New York*, 392 U.S. 40 (1968), decided after the decision of the Georgia Supreme Court in *Wood v. State, supra*. Yet, the Georgia Court of Appeals has apparently repudiated this limitation upon protective searches under Ga. Code Ann. §27-309 since there was no showing in the courts of the State of Georgia, at any time, of any particular facts, within the officers' knowledge and understanding prior to the commencement of the search here in issue, from which it could have been "reasonably inferred that the individual was armed and dangerous." *Sibron v. New York, supra*, at 64. This Court held that such condition is necessary in order for a search for weapons to be reasonable in police confrontations short of arrest. The Georgia Court of Appeals, citing *Terry v. Ohio, supra*, for the proposition that a search for weapons must be limited to a pat-down of the person's outer clothing, completely disregarded the operative condition upon which such protective frisks might be initiated, *i.e.*, the reasonableness of a belief that the person is armed. *Terry v. Ohio, supra*, at 27; *Sibron v. New York, supra*, at 64. The *Terry* case was considered to have presented a Federal question sufficiently substantial to invoke the exercise by this Court of its supervisory jurisdiction on writ of certiorari. The *Sibron* case, dealing with a statute permitting the so-called "stop and frisk" of persons suspected of criminal activity, was determined to present a substantial Federal question and this Court exercised its appellate jurisdiction in that case. Here, the Georgia Court of Appeals has chosen not to base the authority of the search upon the "other persons"

clause of the search warrant, which it regarded to be "superfluous," but instead squarely justified the search here on the provisions of the statute. The failure to require that the commencement of the weapons search be based on facts from which the officers could have reasonably inferred the "other persons" were armed, and the simple justification of the search on the basis that "Code Ann. §27-309 specifically gives the officer the right to search for weapons," 228 S.E.2d at 312, is a diminution of the Fourth Amendment protection against unreasonable protective searches for weapons which is substantial in terms of constitutional protections of the individual and is a proper case for review by appeal in this Court.

The search of the person of Appellant for evidence of the possession of cocaine was said to have been justified under Code Ann. §27-309(b). There was no showing that any violation was evident prior to the search of Appellant Campbell's pocket. As previously stated, the cocaine which was located on the premises was concealed and was not evident when the officers commenced the — search of the "other persons" on the premises. This Court, in *United States v. Di Re*, 332 U.S. 581, 587 (1948), stated:

> The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason

> for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?
>
> * * * We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

The Georgia Court of Appeals has disregarded the fundamental principle, recognized and applied in the *Di Re* case by this Court, that the search of the person of an occupant of a house or a car authorized to be searched does not render the search of the person reasonable. The Supreme Court of Georgia, in *Wood v. State, supra*, regarded these principles to be *dicta* and refused to apply them. The Georgia Court of Appeals, in all subsequent cases, has likewise treated the *Di Re* holding as *dictum*. We respectfully submit that the application of these principles were necessary to the holding of this Court in the *Di Re* case and are not *dicta*. The holding of the Georgia Court of Appeals that Ga. Code Ann. §27-309(b) subjects the occupants of premises authorized to be searched to the loss of their personal immunity against unreasonable searches

and seizures flies in the face of valid constitutional principles established by this Court, thereby presenting a substantial Federal question for review under the appellate jurisdiction of this Court.

In *Vale v. Louisiana*, 399 U.S. 30, 31 (1970), this Court said in a footnote:

> * * *
>
> Although the state court referred to this statute in the course of its opinion, we do not understand its opinion to be grounded on the statute. We therefore dismiss the appeal and treat the papers as a petition for certiorari, which is hereby granted. 28 U.S.C. § 2103.

There was not mere reference to Ga. Code Ann. §27-309 in this case. The Georgia Court of Appeals said (228 S.E.2d at 311-312):

> * * * Thus, if defendant's search is to be upheld on the basis of the warrant, the state must demonstrate that the officer acted under either of the two justifications provided by Code §27-309.
>
> * * * * *
>
> In summation, we note that the "other persons" clause was superfluous; it neither made the warrant general nor extended authority to search anyone other than the person named, i.e., "Tim." However, because the officers were executing a valid warrant, under Code Ann.

> §27-309 they were permitted to make a very limited search of those present in the apartment at the time. When, in the course of that search, officers found what they suspected to be weapons or cocaine, they were authorized under the statute to seize those items.

For the foregoing reasons, it is respectfully submitted that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Argument In Support Of Appellant's Contention That The Opinion Below Is Contrary To Controlling Legal Principles Under The Fourth And Fourteenth Amendments To The United States Constitution.

Primary reliance is placed by Appellant upon this Court's opinion in *United States v. DiRe, supra*, that a person's personal immunity against unreasonable searches and seizures is not forfeited by his mere presence on premises for which a magistrate has authorized a search. Further reliance is placed by Appellant upon the holding of this Court in *Sibron v. New York, supra*, in which this Court stated, at page 64:

> 'Before [an officer] places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self protective search for weapons, he must be able to point to particular facts from which he

reasonably inferred that the individual was armed and dangerous.

The record in this case clearly reflects that the officers here did not have the slightest notion that Appellant Campbell was armed. He obeyed their command to stand with his hands placed against the walls and the officer who searched him acknowledged that the weapons were discovered after the search for evidence had been commenced and produced a quantity of cocaine. It would be unreasonable to conclude that this was a protective search under the limitations constitutionally imposed in the *Terry* and *Sibron* cases. As demonstrated by the quoted testimony of Detective Waddell, *ante*, the search of Appellant was nothing more than the routine action of police officers in Georgia, where the novel "other persons" warrant has been developed and the Georgia Courts have sustained its legality. The holdings of constitutionality, however, cannot square with the *DiRe*, *Terry* or *Sibron* cases, and the holding that Ga. Code Ann. §27-309 nevertheless authorizes the search here is erroneous and contravenes Appellant's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

"Other persons" warrants have never been attempted in the Federal Courts, or, if they have, they must have been summarily rejected by those courts for there is no reported Federal case dealing with such warrants. "Other persons" searches, however, have been made and sustained or rejected upon the basis of the discovery of probable cause or the lack of probable cause upon entering the premises authorized to be

searched. *E.g., United States v. Tellier*, 397 F.2d 494 (7 Cir. 1968); *United States v. Riccitelli*, 259 F.Supp. 665 (D.Conn. 1966); *United States v. Johnson*, 154 U.S.App.D.C. 393, 475 F.2d 977 (1973); *United States v. Haywood*, 284 F.Supp. 245 (D.La.); *United States v. Festa*, 192 F.Supp. 160 (D.Mass). The *Tellier*, *Riccitelli* and *Johnson* cases each dealt with searches of women's purses which had been put down and were not being then worn by them nor did the women claim their purses so that the police would have been on notice that the purses were their separate property. Each of those opinions indicate that if the purses were then being "worn" by the women or if they claimed them, the police would not have been allowed to search them. The *Haywood* and *Festa* cases each suppressed evidence seized from the persons of guests on premises lawfully searched. Another line of cases dealing with the search of guests on premises authorized to be searched turn on the fact that probable cause was discovered when the officers saw the guests committing or participating in an on-going crime. *E.G., Walker v. United States*, 117 U.S.App.D.C. 151, 327 F.2d 597 (1963), *cert. den.*, 377 U.S. 956 (1964); *Clay v. United States*, 246 F.2d 298 (5 Cir.), *cert. den.*, 355 U.S. 863 (1957). Those cases are distinguishable from the instant case on the basis that a search was required to discover the cocaine and weapons on Appellant's person and to discover the cocaine concealed in the back of the chair.

79 C.J.S. Searches & Seizures §81, p. 886, states that "a search warrant is not illegal as a general warrant merely because it authorizes a search of certain premises together with all persons found thereon."

The original authority for that proposition of law was *Lucich v. State*, Md.App., 71 A.2d 432 (1950). In that case, however, the affidavit on which the search warrant was based demonstrated probable cause for the magistrate to believe that each and every person found on the premises at the time the search warrant was executed would be there for illicit purposes. *See* 71 A.2d at 434. The affidavit described the use of a motel by couples for short periods of time, after which the motel attendants would clean the rooms and rent them to other persons. The traffic was all local people and consisted of heterosexual couples. The Georgia Court of Appeals, in *Jackson v. State*, 129 Ga.App. 901, 201 S.E. 2d 816, 819 (1973), relied upon that excerpt from Corpus Juris Secundum in affirming the search there, but none of the bases for determining that everyone present would be criminally involved existed in that case. This necessity was completely overlooked by the Georgia Court of Appeals. That Court relied upon the *Jackson* case in affirming Appellant's conviction, still disregarding the critical difference that made the *Lucich* warrant legal and this one illegal under the Fourth and Fourteenth Amendments to the United States Constitution.

In *People v. Lujan*, 484 P.2d 1238 (Colo, *en banc*), the Court held that the police had no right to search the purse of one guest or the pockets of another while executing a search warrant for the premises.

Relying on *United States v. DiRe*, the Court, in *State v. Wise*, 284 A.2d 292 (Sup. Ct. Del.) held that a warrant authorizing the search of "any occupant or occupants" was a violation of the Fourth and Fourteenth Amendments to the United States Constitution.

In *State v. Masco*, 103 N.J. Super. 277, 247 A.2d 136 (1968), the Court held that "other persons" warrants are unconstitutional but treated the clause as severable and considered the search as having been justified on after-discovered probable cause.

It is obvious from the above cited authorities that a search warrant authorizing the search of persons who were not even known to exist at the time the magistrate determined probable cause cannot be justified under the particularity requirement of the Fourth and Fourteenth Amendments to the United States Constitution. There can be no probable cause, determined by a magistrate, unless facts and circumstances are presented to the magistrate from which he can independently determine probable cause. Where, as here, the magistrate delegates authority to the police to determine who "might" reasonably be involved in the crimes referred to in a search warrant, he has even authorized the intrusion upon the personal security of guests upon a standard less than probable cause. That was done here, which also renders the search warrant in this case to be a general warrant. *Marron v. United States*, 275 U.S. 192, 195 (1927).

And finally, we respectfully disagree with the Court below and with the Court in the *Masco* case, wherein it was held that the "other persons" clause is severable from the search warrant. The severance of a clause acted upon by the executing officers overlooks the fact that a search warrant is directory in its nature, commanding the officers to do all that is ordered by it, and that search warrants must be sufficiently explicit as to prevent the seizure of one thing under a warrant

describing another. *Marron v. United States, supra.* To have judicially construed, after the consumation of the authority contained in the warrant, that the search warrant did not really mean that the officers could search the other persons present, except as they were authorized to do by Ga. Code Ann. §27-309, does not cure the fact that the officers here acted under a grant of unconstitutional authority, printed in every search warrant issued out of the Courts in Fulton County, Georgia, routinely, without any showing to the magistrate or to the Court reviewing the search warrant of any probable cause to believe that Appellant or any other guest likely to be present would be in possession of cocaine. *Accord, Lucich v. State, supra.* These distinctions make a difference and should not have been disregarded by the Court below.

CONCLUSION

Appellant, James Harrison Campbell, III, prays that this Court will place this cause on the Appellate Docket and, after briefs and oral arguments herein, that the judgment of the Court below will be reversed and this cause will be remanded to the Georgia courts for entry of an order suppressing the unconstitutionally seized evidence.

Respectfully submitted,

JAMES A. MC PHERSON
Attorney for Appellant
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581-1973

CERTIFICATE OF SERVICE

I, James A. McPherson, attorney for James Harrison Campbell, III, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of December, 1976, I served copies of the foregoing Jurisdictional Statement on the parties thereto, as follows:

1. On the State of Georgia, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, certified, return receipt requested, to the Attorney General of Georgia, Office of the Attorney General, Atlanta, Georgia;

2. And upon opposing counsel who has represented the State of Georgia in the proceedings heretofore had in the Georgia Court of Appeals and in the Supreme Court of Georgia on application for a writ of certiorari, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, certified, return receipt requested. to Honorable Lewis Slaton, District Attorney's Office, 3rd Floor, Fulton County Courthouse, Atlanta, Georgia 30303.

All parties required to be served have been served.

JAMES A. MC PHERSON
Attorney at Law
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581-1973

APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA

NO. 52309

JAMES HARRISON CAMPBELL, III,
Appellant

versus

STATE OF GEORGIA,
Appellee.

APPEAL FROM THE SUPERIOR COURT
OF
FULTON COUNTY

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

Notice is hereby given that James Harrison Campbell, III, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order affirming the judgment of conviction, dated July 1, 1976, entered herein on or about July 20, 1976, following the denial of a timely petition for rehearing on that date. The Supreme Court of Georgia denied a timely petition for a writ of certiorari on September 23, 1976, in case No. 31645, *sub nom. Campbell v. State.*

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ JAMES A. McPHERSON
JAMES A. McPHERSON
Attorney for Appellant
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581-1975

CERTIFICATE OF SERVICE

I, James A. McPherson, attorney for James Harrison Campbell, III, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 20th day of December, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the parties thereto, as follows:

1. On the State of Georgia, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, registered, return receipt requested, to the Attorney General of Georgia, Office of the Attorney General, Atlanta, Georgia;

2. And upon opposing counsel who has represented the State of Georgia in the proceedings heretofore had in the Georgia Court of Appeals and in the Supreme Court of Georgia on application for a writ of certiorari, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, registered, return receipt requested, to Honorable Lewis Slaton, District Attorney's Office, 3rd Floor, Fulton County Courthouse, Atlanta, Georgia 30303.

All parties required to be served have been served.

/s/ JAMES A. McPHERSON
JAMES A. McPHERSON
Attorney at Law
419 Carondelet Street
New Orleans, Louisiana 70130
Telephone: [504] 581-1975

Attorney for Appellant
Campbell

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 9/23/76

Dear Sir:
Case No. 31645, Campbell v. State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, July 20, 1976

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

52309. J. H. Campbell v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA
JUL. 20, 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS
CLERK

APPENDIX D

Cite as 228 S.E.2d 369

J. H. CAMPBELL

v.

The STATE.

No. 52309.

Court of Appeals of Georgia,
Division No. 1.

July 1, 1976.

Rehearing Denied July 20, 1976.

Defendant was convicted in the Fulton County, Superior Court, G. Ernest Tidwell, J., of violating the state Controlled Substances Act, and he appealed. The Court of Appeals, Stolz, J., held that affidavit in support of search warrant alleged criminal activity with sufficient specificity; that informant's statement that cocaine was currently being stored at apartment was sufficient to fulfill requirement that information in affidavit for search warrant be current; that inclusion of "other persons" clause did not render warrant void as a general warrant; and that where officers were executing valid search warrant for search of person named "Tim," they were permitted to make very limited search of those present in apartment at time, and, when, in course of that search, officers found what they suspected to be weapons or cocaine, they were authorized under statute to seize those items.

Affirmed.

1. Drugs and Narcotics ⇐188

Where affidavit supporting search warrant stated that confidential informant had given officer-affiant information that, while present in apartment, informant observed persons known to him as users of cocaine frequenting said location and that cocaine was now being stored at apartment, and where affidavit stated that informant had been present in apartment on two specific dates and had personally observed "Tim" using, selling, and storing cocaine, affidavit described criminal activity with sufficient specificity for proper issuance of

warrant, though not particularly describing the "known" cocaine users or how they were known.

2. Drugs and Narcotics ⇐188

Informant's statement that cocaine was currently being stored at apartment subject to search warrant was sufficient to fulfill requirement that information in affidavit supporting warrant be current, though affiant was not informed of any pending drug transaction.

3. Searches and Seizures ⇐3.7

Where search warrant specifically identified person and place to be searched and was not directed at searching any person who might happen to enter public place during search, inclusion of "other persons" clause in warrant for search of apartment would not render it void as a general warrant.

4. Searches and Seizures ⇐3.8(2)

Under search warrant containing "other persons" clause which was interpreted to give police no authority to search persons other than "Tim," who was named in warrant, search of defendant, who was present in apartment where "Tim" was located, would be illegal unless it could be upheld due to practical necessities of search environment, under the two justifications specified by statute. Code, § 27–309.

5. Drugs and Narcotics ⇐189

Evidence, including fact that police officers had observed several persons entering apartment which they believed to be situs of several cocaine sales, that "Tim" would not open door and permit their entry, and that defendant and his companions had tried to hide from them when they entered, together with knowledge that cocaine was frequently stored in small plastic bottles, was sufficient to authorize police to remove and seize small plastic bottle and two loaded pistols found in pat-down search from defendant hiding in apartment, even though search warrant only authorized search of "Tim." Code, § 27–309.

6. Searches and Seizures ⇐3.3(5)

Fact that two loaded pistols were tucked under defendant's belt and concealed by his shirt had no relevance in deciding whether or not they were subject to seizure under statute specifically giving police officers right to search for weapons, which right is limited to pat down of person's outer clothing, since fact that weapons were concealed from view by defendant's shirt would not preclude their being felt by police during pat down. Code, § 27–309.

7. Drugs and Narcotics ⇐189

Where police officers were executing valid warrant for search of a person named "Tim," they were permitted to make very limited search of those present in apartment at time, and, when, in course of that search, officers found what they suspected to be weapons and cocaine, they were authorized under statute to seize those items. Code, § 27–309.

Glenn Zell, Atlanta, James A. McPherson, New Orleans, La., Skidmore, Barrett & Jenkins, Timothy N. Skidmore, Kenneth T. Humphries, Atlanta, for appellant.

Lewis R. Slaton, Dist. Atty., Joseph J. Drolet, Gordon H. Miller, Donald J. Stein, Asst. Dist. Attys., Atlanta, for appellee.

STOLZ, Judge.

This is an appeal from defendant Campbell's conviction of violating the Georgia Controlled Substances Act. The essential question before us is whether under a warrant directing the search of "Tim (w/m)", a certain apartment located in Fulton County, "and any other person on said premises who reasonably might be involved in the commission of the aforesaid [drug] violations of the laws of Georgia," police were authorized to search the defendant who was present in the apartment at the time of the search.

The facts pertinent to this appeal are as follows. Prior to execution of the warrant, police officers had placed the premises under surveillance for several hours, during which time police observed several persons arrive at and enter the apartment. Police then knocked at the back (kitchen) door and

identified themselves when someone peered through the window curtain. However, rather than open the door, this person, later identified as "Tim," headed toward the living room. Thereupon police made a forced entry into the kitchen, apprehended "Tim," and proceeded immediately to the living room to round up the other people in the apartment. Upon entering the living room, police observed defendant Campbell trying to hide behind the television. Campbell contends that, not knowing who the intruders were, he had simply tried to hide from them. The officers searched the appellant, finding a small plastic bottle containing white powder in his pocket and two loaded pistols under his belt.

1. The affidavit supporting the warrant stated that a confidential informant had given the officer-affiant information that, while present in the apartment, "he observed persons known to him as users of cocaine frequenting said location . . . [and] that cocaine is now being stored at [the apartment]."

Appellant contends that the warrant was issued without probable cause in that the supporting affidavit contained no description of these "known" cocaine users, did not disclose how the users became known to the informant, and did not allege that the affiant was informed of any impending drug transaction.

[1, 2] The affidavit states that the informant had been present in the apartment on two specific dates and had personally observed "Tim" using, selling, and storing cocaine. Further, the informant had observed other cocaine users frequenting the premises and had stated that "Tim" was currently storing cocaine there. That the "known" cocaine users, or how they were known, were not particularly described, has no bearing on this case in light of our holding, in Division 3 below, that the "other persons" clause in the warrant did not broaden the officers' authority to search anyone other than "Tim." As to the specificity of the informer's information, we believe that the criminal activity was described so that a magistrate might know that it was more than "a casual rumor circulating in the underworld or an accusation based merely on the individual's general reputation." *Spinelli v. United States*, 393 U.S. 410, 416, 89 S.Ct. 584, 589, 21 L.Ed.2d 637; cf. *Jackson v. State*, 129 Ga.App. 901, 904, 201 S.E.2d 816. As to the appellant's contention that the affiant was not informed of an impending drug transaction, the informant's statement that cocaine was currently being stored at the apartment was sufficient to support the requirement that information in an affidavit be current. See *Cochran v. State*, 136 Ga.App. 94, 220 S.E.2d 83.

[3] 2. The appellant also argues that the inclusion of an "other persons" clause renders this a general warrant. However, this warrant specifically identifies the person and place to be searched, and, unlike the situation in *Wilson v. State*, 136 Ga. App. 70, 221 S.E.2d 62 and *State v. Cochran*, 135 Ga.App. 47, 217 S.E.2d 181, it was not directed at searching any person who might happen to enter a public place during the search. "[A] warrant which identifies the premises and its owners or occupants is not void as a general warrant because it authorizes the search of other persons found there who may reasonably be involved in the commission of the crime for which the warrant is issued." *Willis v. State*, 122 Ga.App. 455, 457, 177 S.E.2d 487, 488; accord, *Jackson v. State*, 129 Ga.App. 901(1)(d), 201 S.E.2d 816, supra.

[4] 3. With particular regard to the "other persons" clause in this warrant, we note that this language gives police no authority to search persons other than "Tim" unless such search falls within the ambit of Code Ann. § 27–309. Language identical to that contained in this warrant was considered in our opinion, issued this month, in *Smith v. State*, 138 Ga.App. 129, 227 S.E.2d 911, wherein we stated that Code Ann. § 27–309 "describes the maximum extent to which the particularity of description required by the Fourth Amendment may be encroached upon by the practical necessities of the search environment. [Cits.] Thus, if defendant's search is to be upheld on the

basis of the warrant, the State must demonstrate that the officer acted under either of the two justifications provided by Code § 27–309." See also *Wallace v. State*, 131 Ga.App. 204, 205 S.E.2d 523.

[5] 4. Code Ann. § 27–309 allows a very limited search of persons present on the premises at the time of the search to look only for weapons or for the items particularly described in the warrant. The record discloses that police found a small plastic bottle in the defendant's right pocket during the search. Whether or not that bottle could be removed from the defendant's pocket depended upon whether police reasonably believed that this bottle contained cocaine. The state presented evidence that they had observed several persons entering an apartment which they believed to be the situs of several cocaine sales, that "Tim" would not open the door to permit their entry, and that the defendant and his companions had tried to hide from them when they entered. This evidence together with the knowledge that cocaine is frequently stored in the small plastic bottles was sufficient to authorize police to remove and seize the bottle of white powder. See *Willis v. State*, supra.

[6] As the search of defendant Campbell continued, police found two loaded pistols tucked under his belt. The fact that these weapons were concealed by the defendant's shirt, which hung over his belt, has no relevance in deciding whether or not they were subject to seizure. Code Ann. § 27-309 specifically gives the officer the right to search for weapons. In conjunction with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, this right is limited to a pat-down of the person's outer clothing. *Smith v. State*, supra. That the weapons were concealed from view by the defendant's shirt does not preclude their being felt by police during a pat-down.

There is some trial testimony indicating that all occupants of the apartment were strip-searched. However, both the defendant and the state indicate that the weapons were seized from under the defendant's shirt and thus we conclude that if a strip-search did indeed occur, it took place after the weapons were seized.

This case is unlike *Jones v. State*, 126 Ga.App. 841, 192 S.E.2d 171, where police armed with a warrant to search "Barry" and the "entire first floor of a two-story frame dwelling", could not locate Barry and instead searched two male occupants, who merely were playing chess by candlelight. Nor is this case similar to *Wallace v. State*, supra, or *Smith v. State*, supra, both of which involved searches of a person arriving at the premises after the search had begun and as to whom there was otherwise no probable cause.

[7] In summation, we note that the "other persons" clause was superfluous; it neither made the warrant general nor extended authority to search anyone other than the person named, i. e. "Tim." However, because the officers were executing a valid warrant, under Code Ann. § 27–309 they were permitted to make a very limited search of those present in the apartment at the time. When, in the course of that search, officers found what they suspected to be weapons or cocaine, they were authorized under the statute to seize those items.

Judgment affirmed.

BELL, C. J., and CLARK, J., concur.

BEST COPY AVAILABLE

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE,
Plaintiff

versus Case No. 27791

JAMES CAMPBELL,
Defendant

Filed: Sep. 19, 1975

DEMURRER AND SECOND MOTION TO SUPPRESS

COMES NOW the Defendant, JAMES CAMPBELL, in the above styled case and shows as follows:

1.

That the police officers did search James Campbell after entering an apartment pursuant to a search warrant which mentioned only a person called Tim as the person to be searched; that the police officers did search the defendant without any probable cause or underlying facts because he was present in the living room and therefore said search was a general search and was void and unconstitutional, and the drugs found on him be suppressed.

2.

Defendant demurs to Ga. Code Ann. 27-309 (Acts 166, pp. 567, 570) and shows that said statute is unconstitutional on its face and as applied since it allows the police officer to detain and search any person located on the premises without probable cause or any underlying facts for the sole reason that the person is merely present; that the standard in said statute permits a detention and search with less than probable cause and therefore violates the Fourth and Fourteenth Amendment of the United States Constitution.

WHEREFORE, Defendant prays his Demurrer and Motion be granted.

/s/ GLENN ZELL
GLENN ZELL
Attorney for Defendant

Suite 822
15 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 524-6878

CERTIFICATE OF SERVICE

This is to certify that I have this day served Lewis Slaton, District Attorney of Fulton County, Fulton County Courthouse with a copy of this Demurrer and Second Motion To Suppress by personal service.

This 19 day of September, 1975.

/s/ GLENN ZELL
GLENN ZELL
Attorney for Defendant

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

versus INDICTMENTS
NO. A-27791-92

JAMES H. RRISON CAMPBELL,
CHARLES MAXWELL ROBINSON,
ANTHONY STEVE WHITFIELD,
AND TIMOTHY JOSEPH DEUSER

Filed: Sept. 12, 1975

ORDER

The Motions of each of the defendants in the above-styled matters to suppress the evidence having come on for hearing, after hearing evidence and argument, said Motions to Suppress of each and every defendant are hereby overruled upon each and every ground thereof.

IT IS SO ORDERED.

This 11th day of September, 1975.

/s/ E. G. TIDWELL
JUDGE
Fulton Superior Court,
A.J.C.

cc: Gordon Miller, Esq.
301 Fulton County Courthouse

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Supreme Court, U. S.
FILED
FEB 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-862

JAMES HARRISON CAMPBELL, III,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

MOTION TO AFFIRM

Please serve:

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Staff Assistant
Attorney General

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-862

JAMES HARRISON CAMPBELL, III,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MOTION TO AFFIRM

The State of Georgia, by and through the Attorney General of the State of Georgia, moves this Court to affirm the judgment of the Georgia Court of Appeals in Campbell v. State, 139 Ga. App. 389, 228 S.E. 2d 309 (1976) in that the search of Appellant conducted by police officers was in no way violative of Appellant's rights under the Fourth Amendment to the United States Constitution; therefore, the issue is so insubstantial that no further argument is warranted and the judgment rendered by the Georgia Court of Appeals was correct.

STATEMENT OF FACTS

To properly assess the reasonableness of the search conducted, it is necessary to recount briefly the facts developed at trial and at the hearing on the motion to suppress prior to trial. Those facts show that on June 23, 1975, Detective Waddell of the Atlanta Narcotics Squad, upon a showing of probable cause based upon information from a confidential source, obtained a warrant to search the person and apartment of one "Tim (W/M)." (T. 410, Exhibit 1).[1] The informant, who, according to the detective, had been accurate and reliable on previous occasions, said that he had personally observed the use of and trafficking in cocaine at "Tim's" apartment and that the apartment was frequented by users of the drug cocaine; furthermore, cocaine was presently stored at the location. (T. 410, Exhibit 1).

---

[1]T. refers to the trial transcript; M.T. refers to the motion transcript.

Armed with the search warrant, Detective Waddell, accompanied by several other officers, went to the apartment, there joining still other officers who had kept the apartment under surveillance for several hours. (M.T. 89-90). Just before the detective arrived, Appellant Campbell had entered the apartment (M.T. 153-54); on his person were approximately two ounces of cocaine in transparent plastic bags.[2] (T. 68).

Shortly after Appellant had entered, the detectives knocked on the rear door. (T. 26-27). Timothy Deuser, later identified as the "Tim" named in the warrant, raised the curtain covering the door's window and peered out. (T. 27). The officers identified themselves to Deuser; however, rather than admitting them pursuant to a valid search warrant Deuser took off back toward the living room where Appellant and a number of other persons were consummating a drug deal for the purchase of over $3,000 worth of cocaine. (T. 68-70).

Obviously fearing that Deuser or some of the others in the apartment were about to destroy the cocaine for which the warrant had been obtained authorizing the search, the officers forced their way in through the rear door. (T. 28). By the time they had entered, Deuser was halfway back to the living room where his "guests" were assembled. (T. 28). As the officers came in, Appellant fled, attempting to hide behind a television set.

---

[2]As the search later disclosed, he also was carrying additional cocaine in a plastic vial in his pocket and two loaded revolvers concealed underneath his shirt.

(T. 29). All of the parties present were searched. Detective Waddell, who had spotted Appellant attempting to flee and duck behind the television, searched Appellant. (T. 25-26).

Appellant was leaned against the wall, braced with his hands. As Detective Waddell commenced the frisk of Appellant he felt a plastic bottle in Appellant's right pocket. The detective extracted the bottle and saw that it contained a white powdery substance. (M.T. 24-25, T. 25). Continuing the frisk, the detective discovered two pistols, one a .45 caliber and the other a .38 caliber, tucked inside the back of Appellant's trousers and concealed by the tail of his loose-hanging shirt (T. 25-26); both weapons were loaded and had cartridges in the chambers. (T. 26). While Detective Waddell was conducting his frisk search, Appellant had attempted to reach behind his back where he had concealed the loaded weapons. (M.T. 32).

The plastic bottle removed from Appellant's pocket was found to contain 3.1 grams of 35.7 percent pure cocaine. (T. 187).

ARGUMENT

I. THE EXCEPTIONS TO THE WARRANT REQUIREMENT WHICH ARE CONTAINED IN [1966] GA. LAWS 567, 570 [GA. CODE ANN. § 27-309] ADHERE TO FEDERAL CONSTITUTIONAL STANDARDS; HENCE, THE INSTANT SEARCH CARRIED OUT PURSUANT TO A WARRANT WAS NOT VIOLATIVE OF APPELLANT'S FOURTH AMENDMENT RIGHTS.

Appellant contends that [1966] Ga. Laws 567, 570 [Ga. Code Ann. § 27-309, hereinafter cited thus] is an unconstitutional extension of the warrantless search exceptions to the Fourth Amendment. Appellant's contention, as his interpretation of § 27-309, is ill-founded. Rather than carving additional exceptions to the warrant requirement, § 27-309 simply spells out the judicially recognized limitations on those exceptions.

Section 27-309 reads:

> "In the execution of the warrant the person executing the same may reasonably detain or search any person in the place at the time:
>
> (a) to protect himself from attack, or
> (b) to prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The statute plainly authorizes the detention and search of a person not named in the warrant under which the search is being carried out in only two instances: (1) for the protection of those conducting the search and (2) to prevent the destruction or removal of items named in the warrant. The former is the typical case embraced by Terry v. Ohio, 392 U.S. 1 (1968); the latter was recognized in Johnson v. United States, 333 U.S. 10 (1947).

Indeed, the Georgia courts have so limited the applicability of § 27-309. In Wood v. State, 224 Ga. 121, 160 S.E. 2d 368 (1968), the court held that "§ 27-309 allows the search of persons not particularly described in the warrant only where the executing officer may reasonably believe that it is necessary (1) to protect himself from attack, or (2) to prevent the disposal or concealment of items particularly described in the warrant." Id. at 124, 160 S.E. 2d at 371.

Appellant's contention that § 27-309 dispenses with the necessity of a showing of probable cause is supported neither by the plain wording of the statute nor in the manner in which it has been interpreted and applied. Contrary to the assertions of Appellant, § 27-309 does not authorize routine searches of persons not specified in the warrant, it implicitly forbids them.

Additionally, before the warrant is issued, § 27-303 requires the officer seeking the warrant to state facts sufficient to show probable cause that a crime is being, or has been, committed and describe particularly the place, persons and things to be searched and seized. "It is only after these necessary requirements are met that the warrant may be issued and the search instituted. There is no merit in the contention that Code Ann. § 27-309 authorizes the search of persons without probable cause and without describing the articles to be seized." Wood v. State, 224 Ga. 121, 124, 160 S.E. 2d 368, 370 (1968).

Appellant contends that the "other persons" language contained in the warrant voided it ab initio as a general warrant. The Georgia Court of Appeals answered that argument by saying that the "language gives police no authority to search persons other than 'Tim' unless such search falls within the ambit of Code Ann. § 27-309." Campbell v. State, 139 Ga. App. 389, 391, 328 S.E. 2d 309, 311 (1976).[3]

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[3] In Commonwealth v. Smith, ___ Mass. ___, 348 N.E. 2d 101 (1976), the Supreme Judicial Court of Massachusetts upheld the validity of a search warrant authorizing the search of a named person and "'any person present who may be found to have . . . [heroin] in his possession or under his control or to whom such property may have been delivered . . . . " Id., 348 N.E. 2d at 102. The court commented that it was "virtually impossible to predict

(Footnote continued on next page)

Clearly, the warrant cannot issue initially absent a showing of probable cause; furthermore, during the execution of the warrant, persons not named therein can be searched only for the limited purposes of protecting the officers and preserving contraband or other specified items threatened with removal or destruction.

(Footnote 3 continued)
who would be there at a given time" and from the "asserted facts and fair inferences drawn therefrom, it was permissible to conclude that it was probable that any person in the apartment was a participant in the trafficking in heroin there." Id., 348 N.E. 2d at 106.

Observing that an "any person present" clause must be strictly scrutinized, the court set out several relevant facts to be used in assessing the validity of such a warrant: (1) the premises to be searched are confined and private, (2) the nature of the criminal activity makes it impossible to predict specifically what persons will be present at a given time, and (3) the items specified in the warrant are of a size or kind which renders them easily and likely to be concealed on the person. Id., 348 N.E. 2d at 107.

II. THE SEARCH OF APPELLANT WAS VALID UNDER THE FOURTH AMENDMENT IRRESPECTIVE OF THE APPLICABILITY OF [1966] GA. LAWS 567, 570 [GA. CODE ANN. § 27-309].

Section 27-309 clearly does not authorize unlimited searches of all persons present during the execution of a search warrant. However, assuming arguendo that the statute does allow searches less limited in scope than would be constitutionally permissible, the search of Appellant in the instant case was still a valid search.

As was said in Cooper v. California, 386 U.S. 58, 61 (1967), "the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." The facts disclose that it was. The officers arrived at the residence with a valid search warrant and with the knowledge that the apartment they were about to enter was used by illicit drug traffickers to buy and sell, as well as use, cocaine. While the apartment was under surveillance, the officers observed several persons entering and leaving. One of those who entered, Appellant Campbell, was recognized by Detective Burkhalter who was aware of Appellant's involvement in the illegal drug business. (M.T. 153)[4]

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[4]In response to a question from Appellant's lawyer, Detective Burkhalter stated that he "had known about Mr. Campbell for some time." (M.T. 88).

Upon knocking at the door and identifying themselves as police officers, the officers waited while Tim Deuser peered through the curtains masking the door's window, then bolted from the door in the direction of the occupants in the living room. As the police forced their entry through the rear door, the occupants fled; Appellant attempted to hide behind a television set but was noticed, apprehended and frisked by Detective Waddell. During this search, the detective felt a plastic bottle in Appellant's pocket. The resolution of the issue of whether or not the officer could properly retrieve the bottle from Appellant's pocket was stated succinctly by the Georgia Court of Appeals:

> "The record discloses that police found a small plastic bottle in the defendant's right pocket during the search. Whether or not that bottle could be removed from the defendant's pocket depended upon whether police reasonably believed that this bottle contained cocaine. The state presented evidence that they had observed several persons entering an apartment which they believed to be the situs of several cocaine sales, that 'Tim' would not open the door to permit their entry,

> and that the defendant and his companions had tried to hide from them when they entered. This evidence together with the knowledge that cocaine is frequently stored in small plastic bottles was sufficient to authorize police to remove and seize the bottle of white powder."

Campbell v. State, 139 Ga. App. 389, 391, 228 S.E. 2d 309, 312 (1976).

Appellant places his primary reliance upon dicta contained in United States v. Di Re, 332 U.S. 581 (1948). However, the Di Re case involved the search in a public place of a companion of one who the police had been informed was selling counterfeit gasoline ration coupons. The distinction was noted in United States v. Peep, 490 F. 2d 903 (8th Cir. 1974) where, similar to the present case, officers entered under a warrant to search for narcotics. While officers conducted the search, the defendant (not named in the warrant) entered the apartment. One officer noticed a bulge in the defendant's pocket which he patted to determine if it was a weapon. The bulge proved to be $3,800; a more thorough search revealed matchboxes containing narcotics. The court, citing Di Re, said "[i]t is important to distinguish the search in this case from the search of companions in a public place." Id at 906.

The present case is also similar to Peep in that both defendants attempted to evade the police. The defendant in Peep brushed aside the officer's hand when he attempted to pat down the bulge in his pocket; Appellant here attempted to run behind a television set. "'Deliberately furtive actions * * * at the approach of * * * law officers are strong indicia of mens rea * * *,' Sibron v. New York, [392 U.S. 40, 66, 88 (1968)]." Id.

Clearly, the officers conducting the search were confronted with a multitude of facts sufficient to provide probable cause that Appellant was concealing on his person cocaine in violation of the Georgia Controlled Substances Act; the officers were authorized to be in the apartment and, based upon the actions of Appellant, to detain and frisk him. The search of Appellant was valid under the Fourth Amendment as applicable to the states through the Fourteenth Amendment.

CONCLUSION

The search procedure challenged in this case did not violate any of the requirements of the Fourth Amendment. Neither does the language of Ga. Code Ann. § 27-309 circumvent constitutional safeguards nor attempt to do so. The search of persons not specified in a warrant is authorized only when the requisite probable cause is present in the form of protection of an officer or preservation of articles which are specified in the warrant.

For the foregoing reasons the judgment of the Georgia Court of Appeals in Campbell v. State, 139 Ga. App. 389, 228 S.E. 2d 309 (1976) should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served true and correct copies of this Motion to Affirm upon the Appellant's attorney by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. James A. McPherson
Attorney for Appellant
419 Carondelet Street
New Orleans, La. 70130

This _____ day of _____, 1977.

_____
JOHN C. WALDEN